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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE OLD ORCHARD CONSERVANCY, Plaintiff and Appellant, v. CITY OF SANTA ANA, Defendant and Respondent; CIVIC PROPERTY GROUP, INC., Real Party in Interest and Respondent.	G053003 (Super. Ct. No. 30-2014-00714225) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

FitzGerald Yap Kreditor, Deborah M. Rosenthal, Eric P. Francisconi and Natalie N. FitzGerald for Plaintiff and Appellant.

Sonia R. Carvalho, City Attorney, Sandra M. Schwarzmann, Assistant City Attorney; Best Best & Krieger, Michelle Ouellette and Sarah E. Owsowitz for Defendant and Respondent.

Rutan & Tucker, Joel D. Kuperberg and Jeffrey T. Melching for Real Party in Interest and Respondent.

* * *

INTRODUCTION

I.

Background

This appeal arises out of the decision by the City of Santa Ana (the City) to approve the development of a five-acre parcel of real property (the Property) that included the remains of an orange grove and a farmhouse. The Old Orchard Conservancy (Old Orchard) brought a petition for writ of mandate in the trial court to challenge the City's action. The court denied the petition for writ of mandate, and Old Orchard is appealing from the judgment.

The Property had been planted with Valencia orange trees in around 1912. When the last member of the family that had owned the Property died in 2006, the Property passed to Orange Lutheran High School and Concordia University Foundation, which we refer to as the Schools.[1] The Schools sought to develop the Property into 24 single-family homes. We refer to the proposed development as the Project. The City commenced environmental review of the Project pursuant to the California Environmental Quality Act, Public Resources Code section 21000 et seq. (CEQA). Old Orchard, a California nonprofit public benefit corporation, was formed to oppose the Project and to preserve the remaining orange grove.

A draft final environmental impact report (EIR) considered eight development alternatives to the original proposal for 24 homes. Ultimately, the Schools

[1] The Schools appear as respondents in this appeal by means of an entity called Civic Property Group, Inc., which substituted into the litigation at an unidentified point in time. For simplicity, we use the term "the Schools" throughout our opinion to refer to the real party in interest and respondent.

sought approval by the City of what is called the "Historic Preservation Alternative." Under this alternative, 22 instead of 24 new homes would be built, the original Craftsman-style farmhouse and garage would be rehabilitated, and a small grove of 16 orange trees surrounding the farmhouse would be preserved or replanted on the northwest corner of the Property to recreate the historic setting. To go forward with the Project, the Schools applied for certification of a final EIR and approval of a vesting tentative subdivision map and a variance from the City's street frontage zoning requirement (the frontage variance) for one of the lots in the Project.

Over opposition from Old Orchard, the City Council approved the Historic Preservation Alternative of the Project in March 2014 and reapproved it in September 2014. The City Council's decision to vote twice to approve the Project is a crucial issue in this case.

On March 4, 2014, the City adopted a resolution (the March Resolution) certifying a final EIR and approving the vesting tentative subdivision map and the frontage variance. Old Orchard filed a petition for writ of mandate to overturn that decision. Several months later, it was discovered that the March Resolution did not include findings required by CEQA (CEQA findings). The City Council scheduled another meeting for September 2, 2014 to reconsider the Project, but at that meeting, after voting to approve the Project, the City Council voted to reopen the matter and reconsider it on September 16 because a member of the City Council had declared a potential conflict of interest. The City Council voted again on September 16, 2014 to approve the Project and adopted another resolution (the September Resolution) certifying a final EIR, approving the same vesting tentative subdivision map, and approving the frontage variance. This time, the City Council's resolution was accompanied by over 40 pages of CEQA findings (the City's CEQA Findings).

After adoption of the September Resolution, Old Orchard amended its petition for writ of mandate. After receiving briefing and hearing argument, the trial

court denied the amended petition, and a judgment was entered in favor of the City and the Schools, which we refer to collectively as Respondents. Old Orchard appealed from the judgment. We affirm.

II.

Outline of Issues and Conclusions

This appeal raises numerous issues, which have been organized into six categories. Those categories, with Old Orchard's principal contentions and our conclusions, are set forth below.

1. *CEQA Issues*

Old Orchard argues the City's certification of the final EIR and approval of the Project violated CEQA because (1) the March Resolution was adopted without CEQA findings, the City could not make retroactive findings in adopting the September Resolution, and the September Resolution was invalid because the City did not rescind the March Resolution; and (2) the City's CEQA Findings did not comply with CEQA, were inconsistent, and were not supported by substantial evidence.

We conclude the City did not proceed as required by law in passing the March Resolution because the City did not make CEQA findings. The City corrected the error by reconsidering its approval of the Project, holding another hearing, and making CEQA findings when adopting the September Resolution. The City's CEQA Findings complied with CEQA, were not inconsistent, were supported by substantial evidence, and supported the determination that the environmental impacts associated with the Historic Preservation Alternative are less than significant and do not require mitigation. The City therefore did not err by certifying the final EIR in the September Resolution.

2. *Issues Relating to Approval of the Vesting Tentative Subdivision Map*

Old Orchard argues the City's approval of the vesting tentative subdivision map in the September Resolution did not comply with the Subdivision Map Act, Government Code section 66410 et seq. because the City lacked jurisdiction to approve

that map while the map approved in the March Resolution remained in effect. Old Orchard argues the City could not approve the second map without rescinding the first.

We conclude that approval of the vesting tentative subdivision map in the March Resolution deprived the City of discretion, but not jurisdiction, to approve the vesting tentative subdivision map in the September Resolution. The City did not abuse its discretion because the two maps were exactly the same.

3. *Zoning Variance Issues*

Old Orchard argues substantial evidence did not support the approval of the frontage variance in the March Resolution and the September Resolution. The frontage variance allowed lot 12 to have a reduced frontage of 41 feet, which is nine feet shorter than required by the City's municipal code. Substantial evidence supported a finding that the frontage variance was permitted by the City's municipal code. Evidence established the frontage variance was sought and approved for a single lot and not for the Property as a whole. The frontage variance was valid; therefore, the City's approval of the vesting tentative subdivision map also was valid.

4. *Disqualification of Councilmember Issue*

Old Orchard argues that the City Council member Sarmiento had a conflict of interest in September 2014 but improperly voted on September 2, 2014 on two matters related to the Project (Sarmiento did not participate in the vote on September 16, 2014). We conclude Sarmiento did not have an actual conflict of interest and, if he did, he acted properly by voting to reopen the matter and continue it for several weeks.

5. *Administrative Record Issue*

Old Orchard argues the trial court erred by denying its motion to compel production of certain e-mail communications between counsel for the City and counsel for the Schools for inclusion in the administrative record. Assuming those e-mails should have been produced and included in the administrative record, Old Orchard has not asserted or shown prejudice from their exclusion from the record.

6. *Costs Issue*

Old Orchard argues the trial court erred by awarding the City $4,075 in costs. We lack jurisdiction to consider Old Orchard's challenge to the cost award because Old Orchard did not file a notice of appeal from the postjudgment order on Old Orchard's motions to tax costs.

FACTS AND PROCEDURAL HISTORY

I.

The Property

The Property is a five-acre piece of land located at 1584 East Santa Clara Avenue in Santa Ana. The Property was subdivided in 1870 and planted with Valencia orange trees in around 1912. George and Sophia Sexlinger acquired the Property in 1913. In the following year, they constructed a simple, single-story, Craftsman-style home (the farmhouse) on the northwest corner of the Property. Members of the Sexlinger family lived in the farmhouse until 2006, when the last family member died. Since 2006, the farmhouse has been vacant.

The orange grove was arranged in a rectangular grid, 20 rows wide (east to west) and 25 rows long (north to south). Between 1952 and 1980, about half of the orange trees were removed without replanting, leaving about 250 trees. The orange grove was maintained until about 1980. Today, the Property is surrounded by both single-family residences and Fairhaven Memorial Park to the north, single-family residences to the south and west, and Portola Park to the east.

In 2013, the orange grove and the farmhouse were listed on the "Santa Ana Register of Historical Properties" as "the last intact orange grove in Santa Ana remaining from the period of time when orange growing was the predominant business and land use in this area." Yet, at the same time, a certified arborist found that of the original 480 orange trees on the Property, 226 were alive, only 24 of those were healthy, and "[t]here

is almost no part of the trees south of the third row down that is healthy or capable of producing edible fruit."

II.

The Project and Draft EIR

In 2006, upon the death of the last member of the Sexlinger family, the Property passed to the Schools. The Schools sold the Property to a developer, which sought to construct 24 single-family homes on the Property. The developer withdrew its proposal in 2008 due to economic issues, and the Schools reacquired the Property in 2010. Soon thereafter, the Schools authorized a different developer to apply to the City for approval to remove the orange grove, raze the farmhouse and garage, and construct 24 single-family homes on the Property (the Original Proposal).

In May 2011, the City commenced the environmental review process and, in July 2011, produced a draft EIR. With respect to cultural resources impact, the draft EIR stated: "Cultural resources concerns involve the orange grove and structures and its potential for historical and cultural significance. The structures on the [P]roject site were evaluated for its eligibility for listing in the California Register of Historical Resources (CRHR) and listing in the Santa Ana Register of Historical Properties. Currently, the structures on the site are not listed in either directory. It was determined that the [P]roperty was not a part of a historic trend or made a significant contribution to the local or regional history. The [P]roperty was not associated with the lives of persons of importance in the past, and the [P]roperty does not embody the distinctive characteristics of a type, period, region or method of construction. Furthermore, the [P]roperty does not yield information important in prehistory or history. Compared with this orchard, large orchards dominated the industry where marketing, employment, packing and harvesting decisions were made. Larger orchards could meet the growing demand for oranges in the 1920s and 1930s. Although the citrus industry was important in the County of Orange, the site's orchard represents a minor part of that industry, and neither this orchard, nor

other small citrus orchards were significant contributors to the industry. Archival records indicate that the [P]roperty was not a place where important events occurred, or associated with famous people, original settlers, renowned organizations or businesses, or present when the City was founded."

Members of the public expressed concern that the Project would impact an historic resource. In response, in December 2011, the City revised the cultural resources section of the draft EIR. The revised cultural resources section concluded: "The [farmhouse] and orchard, both older than 50 years, were evaluated for eligibility for listing in the CRHR [(California Register of Historical Resources)] and SARHP [(Santa Ana Register of Historical Properties)]; currently, the structures are not listed on either directory. The [P]roperty does not appear to be eligible under any of the CRHR criteria and therefore is not recommended as eligible for listing [in] the CRHR; however, the [P]roperty appears to be eligible for listing in the SARHP under Condition 6 for its status as a building or structure that was associated with the citrus orchard business, which was once common but is now rare due to the conversion of most of the City's historic orange orchards to residential and commercial use by the mid- to late twentieth century." (Underscoring omitted.) The revised cultural resources section noted, as to the farmhouse, "[a]s an individual resource, the residence does not appear to be a notable example of the architectural style, retain high artistic values, or to be the work of a master architect." (Underscoring omitted.)

In April 2012, the City requested the Historic Resources Commission (the HRC) to adopt a resolution to place the Property on the Santa Ana Register of Historical Properties (SARHP) under the "Key" category. The request stated, "[t]he Sexlinger Property is the last intact orange grove in Santa Ana remaining from the period of time when orange growing was the predominant business and land use in this area." The HRC denied the request. In June 2012, the City Council overturned the HRC's decision and

listed the Property on the SARHP. An ad hoc committee of the HRC was formed to investigate alternatives to demolition of the orange grove and the farmhouse.

III.

The Hybrid Development Alternative

As a consequence of the decision to list the Property on the SARHP, the City developed a "Hybrid Development Alternative" under which (1) 21 single-family residences (instead of 24) would be constructed on approximately 4.5 acres; (2) the farmhouse and garage would be relocated about 450 feet from the Property's northwest corner to the northeast corner and rotated 90 degrees; (3) 24 to 30 orange trees on approximately half an acre on the northeast corner would be retained; and (4) a six-foot block wall would be erected around the half-acre parcel.

In October 2012, Jeremy Hollins, the senior architectural historian at URS Corporation, submitted a technical memorandum on the Hybrid Development Alternative. He concluded: "Overall, the Hybrid Development Alternative does prevent demolition of the [farmhouse] and garage, but the [farmhouse] and ancillary building's original orientation, immediate setting, and general environment will not convey its historic significance." Hollins also concluded the Hybrid Development Alternative would not meet the Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings, and, therefore, under the relevant regulations, would cause a "significant impact to a historical resource that cannot be mitigated to a level of less than a significant impact." For that reason, the Hybrid Development Alternative would require a statement of overriding considerations.

IV.

The Final EIR

A draft of the final EIR (the draft Final EIR), dated January 2013, was submitted to the City Planning and Building Agency (the Planning Commission). Under

the section entitled "Introduction and Purpose," the draft Final EIR stated: "The purpose of the EIR is to review the existing conditions, analyze potential environmental impacts, and identify feasible mitigation measures to reduce potentially significant effects. The proposed project consists of the development and construction of 24 single-family residences on approximately five acres. . . . The City Council adopted a resolution that listed the Sexlinger Farmhouse and Orchard on the Santa Ana Register of Historical Properties (SARHP) on June 4, 2012. The action designated the site as 'Key' as described in [the City Municipal Code s]ection 30-2.2(2)c. As such, this document has been updated to reflect the new designation of the site. Furthermore, the [P]roject proposes a vesting tentative tract[2] map to subdivide the site into 24 parcels for single-family residences with living areas ranging from 2,340 to 2,813 square feet. The [P]roject proposes two variances for reduced street frontages."

The draft Final EIR considered eight development alternatives to the original 24-residence proposal.[3] The first alternative was that no development of the Property would occur and the farmhouse would neither be razed nor rehabilitated; in other words, nothing would happen. As to the Hybrid Development Alternative, the draft Final EIR stated: "As most of the trees would be demolished, and the house moved across the parcel and rotated, the Spatial Organization would be lost. The Land Use would transition from a historic single-family residence with agricultural improvements

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[2] A subdivider may obtain protection against changes in applicable local ordinances, policies, and standards by filing a "vesting tentative map" under Government Code sections 66498.1 through 66498.9. "By designating the map as a vesting tentative map, the subdivider gains the vested right to proceed with development (including obtaining building permits) under the law in effect when the map application is considered to be complete." (Curtin et al., Cal. Subdivision Map Act and the Development Process (Cont.Ed.Bar 2d ed. 2016) Map Approvals and Denials, § 9.14.)

[3] The alternatives were (1) "No Build," (2) "Alternate Location of Project," (3) "Park Expansion," (4) "Urban Garden," (5) "Alternate Project Design/Cul de Sac," (6) "Lower Density," (7) "Hybrid Development," and (8) "Environmentally Superior Alternative."

to a suburban development of 21 single family homes, with very few of the extant orange trees to remain. The cultural traditions of the orchard would be completely lost, overall, except for any possible fruit production that may be retained with the few remaining orange trees. Also changed would be the circulation of the lot, which once the trees are felled, will undergo the construction of new roadways, sidewalks, and residential buildings. The vegetation that currently exists would be lost, save for the small section of trees to be maintained adjacent to the new location of the historic [farmhouse]. Lastly, the views and vistas would transition from that of a pastoral and historic small orange grove to that of new residential buildings and roadways."

V.

The Historic Preservation Alternative and Additional Analysis

On behalf of the Schools, the developer sought approval by the Planning Commission of the Original Proposal for construction of 24 single-family residences, certification of the draft Final EIR, and approval of a statement of overriding considerations for the farmhouse and orange grove. Members of Old Orchard appeared at the Planning Commission meeting on February 11, 2013, and voiced their opposition. A motion to recommend that the City Council deny the Project, the draft Final EIR, the statement of overriding considerations, and a vesting tentative subdivision map failed by a tie vote. A competing motion to recommend that the City Council grant the Project, and approve the draft Final EIR and the statement of overriding considerations, also failed by a tie vote. The Schools opted to move the Project forward to the City Council with a recommendation of denial.

Thereafter, Respondents developed a third alternative, called the Historic Preservation Alternative. The Planning Commission had prepared an "Additional Analysis for Response to Comments on the Draft Environmental Impact Report" (the Additional Analysis) to consider the Historic Preservation Alternative. The Additional

Analysis, dated December 13, 2013, described the Historic Preservation Alternative as follows: "The Historic Preservation Alternative is similar to the proposed project except that it would keep in place the existing [farmhouse] and garage located on an approximately 10,044 square foot lot on the northwest corner of the [P]roperty. The exterior of the [farmhouse] and garage would be rehabilitated to Secretary of the Interior historic preservation standards, and the [farmhouse] and garage would be returned to single family residential use per building code requirements for habitable structures. Subsequently, the [farmhouse] would be available for sale for residential use. Approximately ten orange trees currently exist in this portion of the [P]roperty. Additional orange trees would be planted in order to fill out the orchard, and any dead trees would be removed and be replaced with new orange trees. [¶] Twenty-two new single family residences would be developed on the remaining areas of the [P]roperty, each with a lot size ranging from 6,000 square feet to 8,611 square feet. . . . The Historic Preservation Alternative would involve a roadway dedication of approximately eight feet along Santa Clara Avenue which would reduce the setback to five feet for the residential structure that is being preserved. . . . This alternative includes a variance for a lot frontage less than the required minimum width on Lot 12. In addition, a variance for a front yard setback less than the required 20 foot setback would be required for the Sexlinger Orchard structure. No other variances are proposed."

The Additional Analysis included and relied upon a technical memorandum from November 2013 (the Technical Memorandum) prepared by Hollins at the City's request. The Technical Memorandum concluded (1) the Historic Preservation Alternative would meet the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings and, therefore, "impacts" from the Project would be considered mitigated to a level of "less than a significant impact to the SARHP-listed resource"; (2) "[t]he [P]roperty would retain its land use as a small-scale orchard and [the farmhouse], although the orchard space would be much smaller";

(3) "[t]he cultural tradition of growing Valencia orange trees grafted to lemon rootstock will be retained; however, fewer trees would be in the orchard"; and (4) the farmhouse and garage "would remain on-site preserving their cluster arrangement."

The "impacts" of the Historic Preservation Alternative were considered using the factors given in "The National Park Service (NPS) National Register Bulletin 30: Guidelines for Evaluating and Documenting Rural Historic Landscapes" (Bulletin 30) (italics omitted). It listed 11 different rural historic landscape characteristics, which the National Park Service developed into a list of 13 landscape characteristics that specifically apply to orchards as historical resources. Those characteristics included (1) natural systems and features; (2) spatial organization; (3) land use; (4) cultural traditions; (5) circulation; (6) topography; (7) vegetation; (8) buildings and structures; (9) cluster arrangement; (10) small-scale features; (11) constructed water features; (12) views and vistas; and (13) archaeology sites. The impacts of the Historic Preservation Alternative were also considered in light of a 2009 publication from the National Park Service called "Fruitful Legacy: a Historic Context of Orchards in the United States, with Technical Information for Registering Orchards in the National Register of Historic Places."

The Additional Analysis concluded, based on the Technical Memorandum, that the Historic Preservation Alternative would retain characteristics (1), (3), (4), (6), and (8). The Additional Analysis stated: "Under the Historic Preservation Alternative, the extant landscape would undergo a substantial change as the vast majority of the orange trees of the [P]roject site would be removed and a six-foot block wall would be constructed immediately adjacent to the house and remnant trees. There would be substantially fewer trees than what historically existed; however, new trees would be planted in-kind to fill out the parcel and to replace any dead or decaying trees. The new trees would match the existing type (Valencia, grafted to lemon rootstock), and the arrangement, pattern, and shape of the orchard and trees would retain as much feeling,

appearance, and character of the historical resource as feasible. The spatial relationship between the [farmhouse] and garage, orientation of the [P]roperty, and the [P]roperty's visual narrative of a small-scale orchard would also be retained. [¶] The Historic Preservation Alternative prevents demolition of the [farmhouse] and garage, but the immediate setting and general environment would be modified. The [P]roperty would be transformed from a historic single-family residence with agricultural improvements on an approximately five acre parcel to a suburban development with a small orchard and 22 new single-family homes. The [P]roperty would feature the construction of new improvements including roadways, sidewalks, and residential buildings. The vegetation that currently exists would be lost except for the small section of orange trees to be maintained adjacent to the location of the historic [farmhouse]. Lastly, the views and vistas would transition from that of a pastoral and historic small orange grove to that of new residential buildings and roadways."

The Technical Memorandum also concluded that the Historic Preservation Alternative would somewhat impair characteristics (2) (spatial organization), (7) (vegetation), and (12) (views and vistas). The Technical Memorandum stated, "[a]s most of the trees on the [P]roject site would be demolished, the spatial organization would be lost."

As to the farmhouse and garage, the impacts of the Historic Preservation Alternative were also considered under the "Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings" (Cal. Code Regs., tit. 14, § 15064.5, subd. (b)(3) (the Secretary's Standards). The Additional Analysis concluded, based on the Technical Memorandum, that the Historic Preservation Alternative would meet the Secretary's Standards because the farmhouse and garage would be rehabilitated to those standards and returned to single-family residential use.

The Additional Analysis was made available for public comment, and the City responded to all comments, including those submitted by Old Orchard. The Additional Analysis, including the Technical Memorandum, public comments, and responses to public comments, was made an attachment to the draft Final EIR.

VI.

The Schools' Revised Application

The Schools submitted a revised application to the City so that the Project would be consistent with the Historic Preservation Alternative. The Schools requested that the Planning Commission certify the draft Final EIR and approve a mitigation monitoring program, a variance to permit the farmhouse to remain in its current location (the farmhouse variance), the frontage variance, and a vesting tentative subdivision map to allow the Property to be subdivided into 23 lots and the construction of 22 new single-family homes.

The frontage variance was sought to allow lot 12 to have a reduced street frontage of 41 feet (nine feet shorter than required by the City's municipal code). The frontage variance was necessary because "[d]uring the review of the street design for the [P]roject, staff determined that the City did not have a 'knuckle' standard for curvilinear streets, with the original design insufficient to adequately accommodate turning movements for trash trucks and similar sized vehicles. To address this concern, staff used the County's standard for curvilinear streets, which uses a larger 'knuckle' design at street curves. The application of the County's standard impacted the width of the lot fronting the 'knuckle.' Due to the application of this standard, Lot No. 12 cannot meet the 50-foot street frontage standard."

The revised application included an arboricultural evaluation, dated May 22, 2013 (the Arborist Report), prepared by a horticulture and arboriculture consultant. The Arborist Report stated: "There are about 24 healthy trees at this time. Of about 480 spaces 256 are empty, i.e. they died and were removed, 226 are alive, and 24 of those are

healthy." Several of the trees were "weed trees." Four hundred fifty-six new trees would have to be planted to fill the orange grove with healthy trees. The Arborist Report included an aerial infrared photograph and an aerial "normal color" photograph of the Property. The Arborist Report concluded: "At one time [the Property] may have been a viable orchard, or part of one. That time has long pas[s]ed."

The Planning Commission held a public meeting on February 10, 2014 to consider the application made by the Schools. By a vote of six to one, the Planning Commission passed a motion recommending that the City Council adopt a resolution certifying the draft Final EIR and approving the mitigation monitoring program, approving the farmhouse variance and the frontage variance, and approving a vesting proposed tentative subdivision map for 23 lots (with modifications).[4]

VII.

The City Council's First Approval (the March Resolution)

The application of the Schools and the Planning Commission's recommendation came before the City Council at a public meeting held on March 4, 2014. After receiving public comment, the City Council unanimously adopted the March Resolution certifying the draft Final EIR as the final EIR (the Final EIR) and approving the mitigation monitoring program, the farmhouse variance, the frontage variance, and the vesting tentative subdivision map (as conditioned) to allow development of the Property into 23 lots and the construction of 22 new single-family houses in accordance with the Historic Preservation Alternative. The City posted a notice of determination on March 5, 2014.

The March Resolution itself omitted necessary CEQA findings and did not mention that the Historic Preservation Alternative had been substituted for the Original

[4] The modifications included preservation of the farmhouse exterior "utilizing the Secretary of Interior Standards for rehabilitation" and a minimum of 10 trees for the orange grove.

Proposal. The City's Web site for the Project had a link to "Sexlinger Farmhouse and Orchard Findings of Fact and Statement of Overriding Considerations." The findings of fact and statement of overriding considerations posted on the Web site do not appear in the administrative record.

In April 2014, Old Orchard filed its original petition for writ of mandate (the Original Petition), which sought to set aside the certification of the Final EIR and to vacate the approvals of the farmhouse variance, the frontage variance, and the vesting tentative subdivision map. The Original Petition asserted violations of CEQA and the City's municipal code, but did not allege the City failed to make CEQA findings.

VIII.

The City Council's Second Approval (the September Resolution)

In the course of preparing the administrative record, Old Orchard realized the findings posted on the City's Web site were not included in the March Resolution. In an e-mail dated August 18, 2014, a city official stated, "the City will need to re-approve the Orchard/Sexlinger item on 9/2." The City scheduled a public hearing for September 2, 2014 to again consider certifying the Final EIR and approving the farmhouse variance, the frontage variance, and the vesting tentative subdivision map. The notice of the meeting stated: "The City Council previously considered the Final EIR, the Variances and the Vesting Tentative Tract Map on March 4, 2014. To ensure that all necessary findings are made, the City Council will again be asked to consider the Final EIR, the Variances and the Vesting Tentative Tract Map."

The Planning Commission report for the September 2, 2014 meeting stated: "On March 4, 2014 the City Council took final action on the Sexlinger Farmhouse and Orange Orchard development project. The recommended actions, and corresponding resolutions, included a recommendation to adopt a resolution certifying the F[inal]EIR, which included the Findings of Fact that were incorporated by reference. The Findings

of Fact attached to the Resolution reflect the addition of an alternative analysis, the Historic Preservation Analysis, to reflect the Council's adoption of this alternative as the environmentally preferred alternative. Staff recommends that the City Council adopt an updated resolution certifying the F[inal]EIR (which attaches and incorporates by reference the findings), and the re-adoption of the underlying resolution granting the entitlements for the [P]roject, *i.e.*, the approval of two variances and a vesting tentative tract map. [¶] The findings attached to the updated resolution certifying the F[inal]EIR summarize the information contained in the F[inal]EIR, which the City Council fully considered prior to its adoption of the March 4, 2014 resolution, and make a specific reference to the Findings of Fact as a separate action."

The Planning Commission report included a draft resolution of the City Council, attached to which as exhibit A was "CEQA Findings for the Sexlinger Farmhouse and Orchard Residential Development Project," which are the City's CEQA Findings. Those findings are more than 40 pages in length.

The City Council conducted a public hearing on September 2, 2014. Representatives of Old Orchard appeared and argued against approval of the draft Final EIR, the variances, and the vesting tentative subdivision map. Old Orchard argued the City did not have legal authority to take the proposed action unless it first rescinded the March Resolution. One Old Orchard representative argued: "[W]hat we have here is a prima facie, de facto admission by your staff and by the applicant that you blew it. You absolutely blew it the first time around."

At the end of the meeting, the City Council voted four to two in favor of a resolution certifying the Final EIR and approving the City's CEQA Findings, the farmhouse variance, the frontage variance, and the vesting tentative subdivision map.

A few minutes later, the City's mayor asked the City Council to reconsider its decision in order to give the parties the opportunity to "come together and maybe come to some solution." City Council member Sarmiento (who had voted in favor of the

March Resolution) announced he might have a conflict of interest because his son had started attending Orange Lutheran High School. Although Sarmiento did not believe he had a financial conflict, he announced he would recuse himself from voting "out of an abundance of caution." The City Council voted to reopen the matter and to continue it two weeks so it could be considered by absent council members.

The City Council met again on September 16, 2014. By a unanimous vote (with Sarmiento recusing himself), the City Council voted to readopt the September Resolution, which certified the Final EIR and approved the City's CEQA Findings, the farmhouse variance, the frontage variance, and the vesting tentative subdivision map. A notice of determination was posted on September 19, 2014.

IX.

Proceedings on Old Orchard's Amended Petition for Writ of Mandate

Old Orchard amended the Original Petition (the Amended Petition) to challenge both the March Resolution and the September Resolution. The Amended Petition added claims for violation of planning and zoning laws and violation of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.). The Amended Petition alleged, among other things, that the City failed to adopt adequate CEQA findings concurrently with the March Resolution and this failure was not cured by the "sham" hearings on September 2 and 16, 2014. The Amended Petition alleged: "The findings adopted by the City Council on September 2 and 16, 2014 were a retroactive attempt to backfill a defect in the administrative record, rather than a reflection of the City Council's thought processes. The City Council did not have the power to withdraw or rescind its approval more than six months after it became final, and the findings were therefore unrelated, factually, legally and chronologically, to the actual decision to approve the Project."

After receiving briefing and hearing argument, the trial court denied the Amended Petition. The court made these findings on eight issues: (1) substantial

evidence supported the City's finding that the historic significance of the Property would not be adversely affected by demolition of the orchard; (2) substantial evidence supported the City's finding that the prime agricultural soils on the Property would not be adversely affected by demolition of the orchard; (3) the City did not erroneously reject mitigation measures for destruction of the orchard; (4) the City did not erroneously fail to consider feasible alternatives to the loss of the orchard; (5) the March Resolution was made without adequate findings, but findings were appropriately made later and Old Orchard waived the issue; (6) the City's adoption of "retroactive findings" as part of the September Resolution cured the defect of the lack of adequate findings for the March Resolution; (7) the City Council did not violate the City's municipal code by approving the farmhouse variance and the frontage variance; and (8) the City's "duplicate approvals" did not violate due process of law.

In November 2015, a judgment denying the Amended Petition in its entirety was entered. Old Orchard timely appealed from the judgment.

DISCUSSION

I.

CEQA Issues

A. *Overview of CEQA*

"CEQA is a comprehensive scheme designed to provide long-term protection to the environment. [Citation.] In enacting CEQA, the Legislature declared its intention that all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties. [Citations.] CEQA is to be interpreted 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' [Citation.]" (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112.)

"In general, 'CEQA compels government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives. It permits government agencies to approve projects that have an environmentally deleterious effect, but also requires them to justify those choices in light of specific social or economic conditions.' [Citation.]" (*Parchester Village Neighborhood Council v. City of Richmond* (2010) 182 Cal.App.4th 305, 310-311.)

CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies." (Pub. Resources Code, § 21080, subd. (a).) A project subject to CEQA means "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: [¶] (a) An activity directly undertaken by any public agency. [¶] (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies. [¶] (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (Pub. Resources Code, § 21065.)

The term "project" refers to the activity which is being approved, and which may be subject to several discretionary approvals, and does not mean each separate approval. (Cal. Code Regs., tit. 14, § 15378, subd. (c).) (All references to the CEQA Guidelines are to the CEQA guidelines, California Code of Regulations, title 14, section 15000 et seq.)

"An EIR is required for any project that a public agency proposes to carry out or approve that may have a significant effect on the environment. (Pub. Resources Code, §§ 21100, subd. (a), 21151, subd. (a); [CEQA] Guidelines, § 15064, subd. (a)(1).) An EIR must describe the proposed project and its environmental setting, state the objectives sought to be achieved, identify and analyze the significant effects on the

environment, state how those impacts can be mitigated or avoided, and identify and analyze alternatives to the project, among other requirements. (Pub. Resources Code, §§ 21100, subd. (b), 21151; [CEQA] Guidelines, §§ 15124, 15125, 15126.6.) 'The purpose of an [EIR] is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.' (Pub. Resources Code, § 21061.)" (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 465-466, fn. omitted (*Ballona*).)

The EIR is "the 'heart of CEQA.'" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) The EIR's purpose is "to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made." (*Ibid.*) "Thus, the EIR 'protects not only the environment but also informed self-government.'" (*Ibid.*)

"The lead agency must notify the public of the draft EIR, make the draft EIR and all documents referenced in it available for public review, and respond to comments that raise significant environmental issues. (Pub. Resources Code, §§ 21092, 21091, subds. (a), (d); [CEQA] Guidelines, §§ 15087, 15088.) The agency also must consult with and obtain comments from other agencies affected by the project and respond to their comments. (Pub. Resources Code, §§ 21092.5, 21104, 21153; [CEQA] Guidelines, § 15086.) The agency must prepare a final EIR including any revisions to the draft EIR, comments received from the public and from other agencies, and responses to comments. ([CEQA] Guidelines, §§ 15089, subd. (a), 15132.)" (*Ballona, supra,* 201 Cal.App.4th at p. 466.)

Before approving a project, the lead agency must certify that "(1) The final EIR has been completed in compliance with CEQA; [¶] (2) The final EIR was presented to the decisionmaking body of the lead agency and that the decisionmaking body

reviewed and considered the information contained in the final EIR prior to approving the project; and [¶] (3) The final EIR reflects the lead agency's independent judgment and analysis." (CEQA Guidelines, § 15090, subd. (a).)

A public agency may not approve a project that will have significant environmental effects unless the agency makes specific findings as to each significant effect based on substantial evidence in the administrative record. (*Ballona*, *supra*, 201 Cal.App.4th at p. 466.) These findings are commonly called CEQA findings. The requirement of CEQA findings is found both in Public Resource Code section 21081 and CEQA Guidelines section 15091. When a project has been identified as having at least one significant environmental effect, Public Resources Code section 21081 requires the public agency to make one or more of the following three findings with respect to each significant effect: "(1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment. [¶] (2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency. [¶] (3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environment impact report." (Pub. Resources Code, § 21081, subd. (a).) The CEQA Guidelines require the same findings.[5]

[5] CEQA Guidelines section 15091, subdivision (a) also addresses the requirement of CEQA findings: "No public agency shall approve or carry out a project for which an EIR has been certified which identifies one or more significant environmental effects of the project unless the public agency makes one or more written findings for each of those significant effects, accompanied by a brief explanation of the rationale for each finding. The possible findings are: [¶] (1) Changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the final EIR. [¶] (2) Such changes or alterations are within the responsibility and jurisdiction of another public agency and not the agency making the finding. Such changes have been adopted by such other agency or can and

In addition, as to significant effects that are the subject of the third finding (specific economic, legal, social, technological, or other considerations), the public agency, in order to approve the project, must find that "specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." (Pub. Resources Code, § 21081, subd. (b).) "An agency may find, however, that particular economic, social, or other considerations make the alternatives and mitigation measures infeasible and that particular project benefits outweigh the adverse environmental effects. [Citations.]" (*Ballona*, *supra*, 201 Cal.App.4th at p. 466.)

"[A] public agency is not required to favor environmental protection over other considerations, but it must disclose and carefully consider the environmental consequences of its actions, mitigate or avoid adverse environmental effects if feasible, explain the reasons for its actions, and afford the public and other affected agencies an opportunity to participate meaningfully in the environmental review process. The purpose of these requirements is to ensure that public officials and the public are aware of the environmental consequences of decisions before they are made. [Citation.] The EIR process also informs the public of the basis for environmentally significant decisions by public officials and thereby promotes accountability and informed self-government. [Citations.] Before approving the project, the agency must certify that its decisionmaking body reviewed and considered the information contained in the EIR, that the EIR reflects the agency's independent judgment and analysis, and that the EIR was completed in compliance with CEQA. (Pub. Resources Code, § 21082.1, subd. (c); [CEQA] Guidelines, § 15090.)" (*Ballona*, *supra*, 201 Cal.App.4th at pp. 466-467.)

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should be adopted by such other agency. [¶] (3) Specific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the final EIR." The findings "shall be supported by substantial evidence in the record." (CEQA Guidelines, § 15091, subd. (b).)

B. *Standard of Review*

"In reviewing a petition challenging the legality of a lead agency's actions under CEQA, our role is the same as the trial court's. We review the agency's actions, not the trial court's decision, and our inquiry extends 'only to whether there was a prejudicial abuse of discretion' on the part of the agency." (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 923.)

An agency's decision under CEQA is reviewed for abuse of discretion. (Pub. Resources Code, §§ 21168, 21168.5; *Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th 326, 338; *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 777.) Abuse of discretion means the agency failed to proceed in a manner required by law or substantial evidence did not support its decision. (Pub. Resources Code, § 21168.5; *Center for Biological Diversity v. Count of San Bernardino*, *supra*, at p. 338; *Ballona*, *supra*, 201 Cal.App.4th at pp. 467-468.) "'Only if the manner in which an agency failed to follow the law is shown to be prejudicial, or is presumptively prejudicial, as when the department or the board fails to comply with mandatory procedures, must the decision be set aside . . . .'" (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 485 (*EPIC*); see *City of Hayward v. Trustees of California State University* (2015) 242 Cal.App.4th 833, 839 ["When a public agency does not comply with procedures required by law, its decision must be set aside as presumptively prejudicial."].)

The "presumptively prejudicial" standard appears to be at odds with the standard of prejudice in Public Resources Code section 21005. Subdivision (b) of section 21005 states: "It is the intent of the Legislature that, in undertaking judicial review pursuant to Sections 21168 and 21168.5, courts shall continue to follow the established principle that there is no presumption that error is prejudicial." (See *Burrtec*

v. Waste Industries, Inc. v. City of Colton (2002) 97 Cal.App.4th 1133, 1141 ["In applying the CEQA standard of review, there is no presumption error is prejudicial."].)

"[N]o presumption that error is prejudicial" (Pub. Resources Code, § 21005, subd. (b)) and "'presumptively prejudicial'" (*EPIC*, *supra*, 44 Cal.4th at p. 485) are inconsistent standards. In *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 709, the Court of Appeal rejected the argument that failure to comply with mandatory CEQA procedures is presumptively prejudicial as that assertion did not comport with Public Resources Code section 21005.

One way to resolve the inconsistency is to conclude that Public Resources Code section 21005 applies only to information disclosure provisions. Subdivision (a) of section 21005 declares the Legislature's intent "that noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of this division, may constitute a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (Pub. Resources Code, § 21005, subd. (a).) Another way to reconcile the inconsistency is to understand the Legislature's enactment of Public Resources Code section 21005 was "'simply a reminder of the general rule that errors which are insubstantial or de minimis are not prejudicial.'" (*EPIC*, *supra*, 44 Cal.4th at pp. 487, fn. 10.) Noncompliance with mandatory CEQA procedures is substantial, and therefore presumptively prejudicial, while noncompliance with information disclosure provisions would not be subject to Public Resources Code section 21005, subdivision (c), or would not be insubstantial or de minimis.

In *EPIC*, *supra*, 44 Cal.4th 459, the California Supreme Court considered whether an agency's failure to consider public comments was prejudicial. The Supreme Court concluded such failure "must be deemed prejudicial" unless the comments involved material that was "demonstrably repetitive of material already considered," was

"patently irrelevant," or supported the agency's decision. (*Id.* at p. 487.) In those situations, the failure to consider the comments constituted "nothing more than technical error" that "d[id] not subvert the purpose of the public comment provisions." (*Ibid.*) The court noted this standard was "consistent with the standard of prejudice found in Public Resources Code section 21005." (*Id.* at p. 487, fn. 10; see *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 463 ["Insubstantial or merely technical omissions are not grounds for relief."].)

Whether an agency failed to proceed in a manner required by law is a question of law. (*Ballona*, *supra*, 201 Cal.App.4th at p. 468.) "A court determines de novo whether the agency complied with CEQA's procedural requirements" and must scrupulously enforce CEQA requirements. (*Ballona*, *supra*, at p. 468.)

C. *The City Corrected the Error of Failing to Make CEQA Findings.*

The Final EIR found that the Project would have significant environmental "impacts." The City Council could not, therefore, approve the Project without making CEQA findings. (Pub. Resources Code, §§ 21081, 21081.5; CEQA Guidelines, § 15091, subds. (a), (b).) It does not appear the City made CEQA findings with the March Resolution. There is mention of findings being posted on the City's Web site, but those findings, if they ever existed, are not part of the administrative record.

Because the City did not make CEQA findings with the March Resolution, the City did not proceed as required by law as to that resolution.[6] (*Citizens for Quality*

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[6] Respondents assert that Old Orchard failed to exhaust administrative remedies by not bringing the lack of CEQA findings to the City Council's attention before filing the Original Petition. Although Old Orchard did not object to lack of CEQA findings, we conclude there was no failure to exhaust administrative remedies.

A CEQA action to challenge an agency's decision cannot be brought or maintained unless the alleged grounds of noncompliance were presented to the public agency during the public comment period or before the close of the public hearing on the project before issuance of the notice of determination. (Pub. Resources Code, § 21177, subds. (a) & (b).) Exhaustion of administrative remedies does not apply to grounds for

Growth v. City of Mt. Shasta (1988) 198 Cal.App.3d 433, 442 ["a public agency must incorporate the mitigation measures, or make other approved findings, before approving a proposed project with identified significant environmental impact"]; *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 360 ["[Public Resources Code s]ection 21081 makes mandatory certain findings by the Board where an EIR has been completed 'which identified one or more significant effects' from a proposed project."].)

The failure to make CEQA findings was not, as Respondents argue, a mere clerical error. CEQA findings were necessary to approve the Project because the Final EIR identified significant environmental effects.

The City corrected the error, however, by reconsidering its approval of the Project, holding another hearing, and making CEQA findings when adopting the September Resolution. Nothing in CEQA bars an agency from correcting a mistake in this way. The City Council scheduled a public hearing to reconsider the Final EIR, the farmhouse variance, the frontage variance, and the vesting tentative subdivision map. The notice of the meeting stated: "The City Council previously considered the Final EIR, the Variances and the Vesting Tentative Tract Map on March 4, 2014. To ensure that all necessary findings are made, the City Council will again be asked to consider the Final EIR, the Variances and the Vesting Tentative Tract Map."

Public hearings in compliance with CEQA were held on September 2 and 16, 2014. Public comment was received. A vote was taken at which the City Council

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noncompliance for which "there was no public hearing or other opportunity for members of the public to raise those objections . . . prior to the approval of the project." (*Id.*, § 21177, subd. (e).)

Old Orchard did not have the opportunity to object on the ground of failure to make CEQA findings before approval of the Project. The March Resolution was passed on March 4, 2014, and the notice of determination was posted the next day, March 5. Old Orchard could not have asserted lack of CEQA findings at the March 4 hearing because the March Resolution was not passed until the end of the hearing, and the lack of CEQA findings would not have been apparent until that resolution was formally drawn up and attested, which was not until March 7.

members were free to reject the Project. The September Resolution certified the Final EIR and included the City's CEQA Findings, which were over 40 pages long. By holding another hearing and adopting the September Resolution with the necessary CEQA findings, the City Council ultimately complied with mandatory procedures before approving the Project.

Old Orchard argues the City's adoption of the City's CEQA Findings violated CEQA's procedural requirement that CEQA findings be made before certifying an EIR.[7] The City did not simply make CEQA findings at the September 16, 2014 meeting of the City Council. The City noticed a meeting to consider the Project anew. Old Orchard has described the September 2 and 16 hearings variously as a "sham" and a "one-way decision that could only end in reapproval or ratification." The administrative record supports the contrary finding that both the September 2 and September 16 meetings of the City Council were honest and good faith efforts to comply with the letter and spirit of CEQA. Public comment was received at both meetings. Representatives of Old Orchard vigorously spoke against the Project and criticized the City Council and the City's staff.[8]

The City Council members understood at that time they could decline to certify the Final EIR and reject the Project. At the September 2 meeting, councilmember

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[7] Old Orchard also contends the Final EIR did not describe the Project as the Historic Preservation Alternative but "continued to describe the [P]roject as a 24-lot development on five acres, with demolition of all structures and removal of all trees." The Additional Analysis exhaustively analyzed the Historic Preservation Alternative, which had been devised in response to public comment on the draft Final EIR. The notice of determination of the March Resolution described the Project as the Historic Preservation Alternative, as did the Original Petition. There could be no doubt the Historic Preservation Alternative was the version of the Project under consideration.

[8] For example, one representative of Old Orchard stated: "Shame on the Santa Ana Staff—the City Staff for their failure to understand the process and how it works. They continually do a bad job throughout this process for the Sexlinger property." Another Old Orchard representative asked the City Council, "[a]re you guys crazy" and asserted, "[y]ou absolutely blew it the first time around."

Tinajero stated the City Council had given Old Orchard a "fighting chance" and councilmember Martinez stated she would vote against the Project. Two council members (Martinez and Reyna) voted against the Project at the September 2 meeting of the City Council. In contrast, the March Resolution had passed unanimously.

Old Orchard argues the City acted unilaterally when it decided to reconsider the Project and held the September 2 meeting. It is true the City took action without request or prompting by the Schools. But that did not make the City's actions unlawful under CEQA. It was clear that the applicant was the Schools, and the Schools did not object to the City's decision to reconsider the prior approval of the Project. Old Orchard makes a similar argument that the City could not reconsider the March Resolution without first rescinding it. Implicit in the City's action, however, was that a "no" vote at the September 2 meeting would result in a repeal of the March Resolution.

Citing *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499 (*Voices of the Wetlands*), Old Orchard argues, "a complete absence of statutory findings does not authorize any remedy under CEQA except issuance of the writ." In *Voices of the Wetlands*, the California Supreme Court upheld the trial court's decision to order a limited interlocutory remand to a water quality control board to allow it to examine and make findings on a specific issue under the federal Clean Water Act of 1977 (33 U.S.C. § 1251 et seq.). (*Voices of the Wetlands*, *supra,* at pp. 507, 513, 525-531.) The court concluded that Code of Civil Procedure section 1094.5 does not bar a trial court from requiring agency reconsideration of one or more specific findings or conclusions. (*Voices of the Wetlands*, *supra*, at pp. 529-530.) The concurring opinion emphasized that the remand order did not relate to CEQA, and, therefore, the majority opinion had "no occasion here to consider whether a trial court may, similarly, order remand for reconsideration of an agency decision for compliance with CEQA without issuing a writ of mandate." (*Voices of the Wetlands*, *supra*, at p. 539 (conc. opn. of

Werdergar, J.).) In this case, the trial court did not issue a limited interlocutory remand but denied the Amended Petition.

The administrative record shows that the City Council reviewed and considered the information in the draft Final EIR before approving the Project and that the Final EIR reflected the City Council's "independent judgment and analysis" (CEQA Guidelines, § 15090, subd. (a)(3)). The September Resolution included the City's CEQA Findings, which were over 40 pages in length. The purpose of the EIR and CEQA findings has been identified as disclosure of the "'analytic route'" the agency traveled "'from evidence to action.'" (*Laurel Heights Improvements Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404.) "The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account." (*Ballona, supra*, 201 Cal.App.4th at p. 467.) The Final EIR and the City's CEQA Findings disclosed the City's analytic route and showed that the City made its decision with a full understanding of, and taking into account, the Project's environmental consequences.

D. *The City's CEQA Findings Complied with CEQA.*

The City's CEQA Findings state that, at the City Council meeting on September 2, 2014, the City Council determined that all environmental impacts associated with the Historic Preservation Alternative were either "less than significant and do not require mitigation" or "potentially significant but will be avoided or reduced to a level of insignificance through the identified mitigation measures." The City's CEQA Findings stated they "fully account for all impacts analyzed in the EIR, each of which have been determined to have a less than significant impact on the environment with mitigation incorporated."

Old Orchard challenges the City's CEQA Findings and, in particular, the finding that the Project would cause a "[l]ess [t]han [s]ignificant" substantial adverse change in "the significance of a historical resource" as defined in the CEQA Guidelines and the City's requirements.[9] In challenging the City's CEQA Findings, Old Orchard makes five arguments: (1) the historic resource was the entire five-acre orange grove, not just the farmhouse; (2) there was no substantial evidence that preservation of 16 trees and the farmhouse would have no significant adverse impact on the historic resource; (3) the conclusions of the Final EIR were inconsistent; (4) the trial court relied improperly on post-EIR evidence and argument; and (5) the Final EIR failed to consider impacts to agricultural resources.

In June 2012, the City Council listed the Property on the SARHP and designated it as "Key" under the City Municipal Code section 30-2.2(2)c. The Property therefore is considered a historical resource under CEQA.[10] The CEQA Guidelines state,

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[9] The challenged finding is: "The [P]roject site is listed in the Santa Ana Register of Historical Places as of June 4, 2012, and therefore is considered a historical resource for purposes of CEQA. . . . Development of the [P]roject, as now proposed, would preserve in place the existing [farmhouse], garage, and a number of orange grove trees located on Lot 1. However, the [P]roject would cause the extant landscape to undergo a substantial change as the majority of the orange trees of the [P]roject site would be removed. While dead or dying trees would be removed from Lot 1 if required, these would be replaced with trees matching the existing type, arrangement, pattern, and shape of the orchard within Lot 1. This would retain the feeling, appearance, and character of the historical resource in this portion of the [P]roject site. . . . However, while the [P]roject would preserve the [farmhouse], garage, and portion of the orange trees, the [P]roperty would be transformed from a historic single family residence and orchard to a suburban development with a small orchard and 22 new single-family residences. . . . [¶] However, because the [P]roperty would retain many of its major elements and still convey the significance of a property type once common in the City, and because the historic structures will be surrounded by compatible low density residential use, the [P]roperty's location, feeling, and overall character will be maintained. Therefore the [P]roject will meet Secretary of Interior Standards for the Treatment of Historic Properties, reducing any potential for impacts to less than significant."

[10] "'Historical resource' includes, but is not limited to, any object, building, structure, site, area, place, record, or manuscript which is historically or archaeologically

"[a] project with an effect that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment." (CEQA Guidelines, § 15064.5, subd. (b).) "Substantial adverse change in the significance of an historical resource means physical demolition, destruction, relocation, or alteration of the resource or its immediate surroundings such that the significance of an historical resource would be materially impaired." (*Id.*, § 15064.5, subd. (b)(1); see Pub. Resources Code, § 5020.1, subd. (q) ["'Substantial adverse change' means demolition, destruction, relocation, or alteration such that the significance of an historical resource would be impaired."].) A project that follows the Secretary's Standards generally is considered to be "mitigated to a level of less than a significant impact on the historical resource." (CEQA Guidelines, § 15064.5, subd. (b)(3).)

1. *The Historical Resource Was the Orange Grove and the Farmhouse.*

Old Orchard argues the historical resource consisted of the entire five-acre orange grove and the farmhouse, not the farmhouse alone. The Property was designated as a historical resource because it was "the last intact orange grove in Santa Ana" from the period in which citrus growing was the predominant land use and business. Because the orange grove was the historical resource, Old Orchard argues preservation of the farmhouse was not a meaningful substitute for preservation of the five-acre orange grove.

Respondents do not dispute that the historical resource was the five-acre orange grove together with the farmhouse and garage. The Technical Memorandum prepared by Hollins described the historical resource as: "The 5-acre property at 1584 East Santa Clara Avenue in the City of Santa Ana is an historic-age orchard landscape of which the major features include the remnants of a Valencia orange orchard, [the farmhouse], and a garage."

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significant, or is significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California." (Pub. Resources Code, § 5020.1, subd. (j).)

2. *Hollins's Findings Were Consistent.*

The Final EIR concluded the Historic Preservation Alternative would meet the Secretary's Standards, "thereby causing impacts to the [historical] resource as being mitigated to a level of less than a significant impact to the historical resource." Old Orchard argues this finding is not supported by substantial evidence. The gist of Old Orchard's argument is that the Historic Preservation Alternative will lead to the removal of all but 16 trees in the five-acre orange grove and thereby of necessity will have a "substantial adverse change in the significance of an historical resource" (CEQA Guidelines, § 15064.5, subd (b)).

Hollins concluded in the Technical Memorandum that the Historic Preservation Alternative would meet the Secretary's Standards. He found that the Historic Preservation Alternative would retain five of the 13 landscape characteristics developed by the National Park Service based on Bulletin 30 and would retain "portions" of two other of those characteristics. He acknowledged that the Historic Preservation Alternative would cause the extant landscape to "undergo significant change," there would be "fewer trees," the "immediate setting and general environment would be impaired," and the spatial organization would be lost.

But Hollins also found the "cultural tradition of growing Valencia orange trees grafted to lemon rootstock would be retained"; the arrangement, pattern, and shape of the orchard and trees would retain "as much feeling, appearance, and character of the historical resource as feasible"; and the "spatial relationship between the [farmhouse] and garage, orientation of the [P]roperty, and the [P]roperty's visual narrative of a small-scale orchard would be retained." The farmhouse and garage would be rehabilitated to the Secretary's Standards and returned to single-family residential use.

Old Orchard argues, "[t]here is a complete analytic disconnect between the expert's *factual* conclusions that all of the *Bulletin 30* orchard characteristics would be either lost or impaired as a result of the project, and his *opinion* that the Orchard and

associated improvements would nonetheless maintain 'both its significance and integrity' in accordance with the *Secretary's Standards*." This argument is based on the erroneous premise that Hollins concluded that all of the Bulletin 30 characteristics would be lost. To the contrary, Hollins found that the Historic Preservation Alternative would retain characteristics (1), (3), (4), (6), and (8) of the 13 characteristics developed by the National Park Service and found that the Project would somewhat impair characteristics (2), (7), and (12).

Hollins's findings are not inconsistent for the additional reason that the term "substantial adverse change" under CEQA does not mean demolition or destruction alone: substantial adverse change means demolition or destruction "such that the significance of an historical resource would be materially impaired." (CEQA Guidelines, § 15064.5, subd. (b)(1); see Pub. Resources Code, § 5020.1, subd. (q).)

The Final EIR supports the conclusion that the Historic Preservation Alternative, though leading to removal of most of the remaining orange grove, will enhance rather than impair the historical significance of the Property. That is because the Historic Preservation Alternative will lead to rehabilitation of the farmhouse and garage and the replacement of dead, dying, or missing trees with in-kind trees surrounding the farmhouse to recreate the historic setting. In that regard, the Final EIR concluded: "The [P]roperty would retain many of its major elements and still convey the significance of a property type that was once common and is now a rare surviving example in the City. As a Rehabilitation treatment, the [P]roperty would receive a compatible new use that would protect and retain the [P]roperty's character defining features, historic integrity, and major buildings and structures. The [P]roperty's location, feeling, and overall character would be maintained. Surrounding the historic [farmhouse] and garage with historic and in-kind replaced trees would contribute to the [P]roperty's ability to convey a specific period, time, and an agricultural past important to the community."

The trial court found, "the evidence shows that the supposed orchard of citrus, is not that, and much of what it is, is dying or not in good health." This finding is supported by substantial evidence. The Arborist Report noted that, at its peak, the orange grove had about 480 trees, but that, as of May 2013, the orange grove had only 226 trees, of which only 24 were healthy.[11] Aerial photographs showed that trees had been removed altogether in large sections of the Property and there were gaps in the rows of trees. It is undisputed the farmhouse was empty and derelict. The Property more closely resembles the orange grove purchased by W.C. Fields in the classic movie It's a Gift (Paramount Pictures 1934) than the idyllic postcard vision of a California orange grove.

3. *The Analysis of the Historic Preservation Alternative Was Consistent with the Analysis of the Hybrid Development Alternative*.

Old Orchard argues, "[t]here is an equally serious disconnect" between Hollins's analysis of the Hybrid Development Alternative and analysis of the Historic Preservation Alternative. Under the Hybrid Development Alternative, 21 residences would be built instead of 24, the farmhouse and garage would be relocated and rotated in direction, and 24 to 30 trees would be retained on half an acre on the northwest corner. Hollins concluded the Hybrid Development Alternative would not meet the Secretary's Standards and would cause a substantial adverse change in the significance of a historical resource.

Several differences between the Hybrid Development Alternative and the Historic Preservation Alternative explain and provide a rational basis for Hollins's differing conclusions about a substantial adverse change in the significance of a historical resource. Although the Hybrid Development Alternative calls for retention of 24 to 30 orange trees, while the Historic Preservation Alternative calls for a grove of 16 orange trees, Hollins's conclusions are not inconsistent. The Hybrid Development Alternative

[11] We explain in the Discussion section, part I., subpart D.4., the trial court did not err by relying on the Arborist Report.

did not require removal of dead or dying trees and the planting of new, like-kind healthy trees. Under the Hybrid Development Alternative, "[n]o trees will be relocated or moved; rather, 24 to 30 orange trees will remain in their present place, near the relocated buildings." In contrast, the Historic Preservation Alternative requires replacement and addition of in-kind trees, thereby retaining the cultural tradition of growing Valencia orange trees grafted onto lemon rootstock.

Because the Hybrid Development Alternative calls for the relocation and rotation of the farmhouse and garage, Hollins concluded the "Spatial Organization" would be lost, and the "original orientation, immediate setting, and general environment" of the farmhouse and garage would not convey their "historic significance." Hollins concluded the Hybrid Development Alternative would not meet the Secretary's Standards, which recommended against removing, radically changing, or relocating buildings "thus destroying their historic relationship within the setting." In contrast, Hollins concluded, spatial organization would be impaired, but not lost, under the Historic Preservation Alternative.

The Hybrid Development Alternative did not require rehabilitation of the farmhouse for use as a residence. Under the Historic Preservation Alternative, the farmhouse would be rehabilitated according to the Secretary's Standards and returned to use as a residence.

4. *The Trial Court Did Not Err by Considering Evidence of the Orange Grove's Actual Condition.*

The initial study/notice of preparation (Initial Study) for the Project was issued in May 2011. Under the section entitled "Environmental Setting," the Initial Study described the existing land use as about five acres with an uninhabited "Craftsman Bungalow type residence" flanked on the east and south by "an orange grove consisting of approximately 250 orange trees." The draft Final EIR and the Additional Analysis likewise described the "principal vegetation type" as "approximately 250 Valencia

orange trees grafted to lemon rootstock." The Initial Study, the draft Final EIR, and the Additional Analysis do not describe the condition of the trees.

Old Orchard argues that, under the CEQA Guidelines, the description of the orange grove as approximately 250 orange trees is the baseline for evaluating environmental impacts. The trial court erred, Old Orchard argues, by considering post-EIR evidence, specifically the Arborist Report (from May 2013), in finding the Project would not have a significant impact. The trial court found that "the evidence shows that the supposed orchard of citrus, is not that, and much of what it is, is dying or not in good health." According to the Arborist Report, as of May 2013, the orange grove had 226 trees, of which only 24 were healthy.

The baseline refers to the requirement under CEQA Guidelines section 15125, subdivision (a), that an EIR "must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published." CEQA Guidelines section 15125, subdivision (a) provides, however, that the physical environmental conditions at the time the notice of preparation is published will "*normally*" (italics added) but not necessarily constitute the baseline physical conditions.[12] (See *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 336 [use of the word "'normally'" in CEQA Guidelines section 15125, subdivision (a) "necessarily contemplates that physical conditions *at other points in time* may constitute the appropriate baseline or environmental setting"].)

Thus, "the agency is not strictly limited to those [conditions] prevailing during the period of EIR preparation." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, *supra*, 57 Cal.4th at p. 452.) As explained by the Supreme Court in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*,

[12] "This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." (CEQA Guidelines, § 15125, subd. (a).)

"CEQA imposes no 'uniform, inflexible rule for determination of the existing conditions baseline,' instead leaving to a sound exercise of agency discretion the exact method of measuring the existing environmental conditions upon which the project will operate." (*Id.* at pp. 452-453.)

In its sound discretion, the City could use May 2013 as the baseline from which to measure existing environmental conditions. A baseline date of May 2013 produces a more accurate assessment of the environmental condition of the Property. It also can be said the effect of the Arborist Report was not to alter the baseline physical condition, which was the same at about 250 trees. The Arborist Report provided evidence of the baseline physical conditions as they exist; that is, of the remaining trees, only 24 were healthy. CEQA did not require the City or the trial court to ignore evidence of the *actual* condition of the orange trees identified in the Initial Study, the draft Final EIR, and the Additional Analysis. A purpose of CEQA is to inform government decision makers and the public about significant environmental effects of the proposed project before a decision is made. (*Citizens of Goleta Valley v. Board of Supervisors*, *supra*, 52 Cal.3d at p. 564.) That purpose is advanced by a complete and accurate picture of the baseline physical conditions as they actually exist.

5. *The Property Is Not Agricultural Land Under CEQA.*

Old Orchard's last challenge to the Final EIR and the City's CEQA Findings is that they failed to consider the Project's impact on agricultural resources. Old Orchard argues the Property was in active agricultural use and, therefore, mitigation was required under CEQA.

In determining whether a project impacts agricultural resources, the CEQA Guidelines ask whether the project "could result in conversion of Farmland, to non-agricultural use." (CEQA Guidelines, appen. G, § II, subd. (e).) CEQA defines "agricultural land" as either (1) "prime farmland, farmland of statewide importance, or

unique farmland, as defined by the United States Department of Agriculture land inventory and monitoring criteria, as modified for California" (Pub. Resources Code, § 21060.1, subd. (a)) or (2) "[i]n those areas of the state where lands have not been surveyed for the classifications[,] . . . land that meets the requirements of 'prime agricultural land' as defined in paragraph (1), (2), (3), or (4) of subdivision (c) of Section 51201 of the Government Code" (*id.*, § 21060.1, subd. (b)).

The City's CEQA Findings include a finding that the Project will not result in conversion of "Prime Farmland, Unique Farmland, or Farmland of Statewide Importance to non-agricultural use." The trial court found that the Property did not constitute prime farmland.

Substantial evidence supported the finding the Property is not "prime farmland, farmland of statewide importance, or unique farmland. (Pub. Resources Code, § 21060.1, subd. (a).) The state's Farmland Mapping and Monitoring Program (FMMP) determined the entirety of the City is "urban and built up" and has no "Prime Farmland, Unique Farmland, or Farmland of Statewide Importance." Old Orchard does not dispute that the FMMP constitutes survey and classification of state land under Public Resources Code section 21060.1. Old Orchard attacks the FMMP determination as containing "demonstrably erroneous information" because the Property still has fruit-bearing orange trees. But to be prime farmland or farmland of statewide importance, the FMMP requires that the land "[h]as been used for irrigated agricultural production at some time during the four years prior to the Important Farmland Map date." The Property ceased being irrigated since sometime before 2000 and had not been used for agricultural production since 1980. The FMMP map date was 2010.

In its reply brief, Old Orchard argues for the first time that (1) Respondents offered no evidence that the FMMP actually surveyed the Property and (2) the FMMP states that its map "is not designed to be used for parcel-specific planning purposes due to its scale and the size of the minimum mapping unit (ten acres)." The FMMP map is

simply a cartographic representation of the FMMP's determinations. The FMMP determined that the City contains no prime farmland. The Property does not qualify as prime farmland under the FMMP's standards because it had not been used for irrigated agricultural production for four years prior to the FMMP map date.

Because the Property was surveyed and classified by the FMMP, the Property cannot come within the second CEQA definition for agricultural land. (See Pub. Resources Code, § 21060.1, subd. (b). ["where lands have not been surveyed"].)

II.

Issues Relating to Approval of the Vesting Tentative Subdivision Map

One of the components of the March Resolution and the September Resolution was approval of a vesting tentative subdivision map permitting the Property to be subdivided into 23 lots according to the Historic Preservation Alternative. Old Orchard argues the approval of the tentative subdivision map in the September Resolution did not comply with the Subdivision Map Act because (1) the City lacked jurisdiction to act on a second map while the first map remained in effect; (2) the City unilaterally placed approval of the second vesting tentative subdivision map on the agenda for the September 2 meeting of the City Council without a formal request by an applicant; (3) the City Council approved the vesting tentative subdivision map at the September 2 meeting of the City Council without rescinding the map approved in the March Resolution; and (4) the City's explanations for approving the second map are inconsistent and pretextual.

A. *Old Orchard Did Not Forfeit Its Challenge to the Vesting Tentative Subdivision Map.*

We next address Respondents' contention that Old Orchard forfeited its challenge to the vesting subdivision map by failing to raise any claim under the Subdivision Map Act in the trial court. Government Code section 66499.37 creates a 90-day statute of limitations for "*any* action involving a controversy over or arising out of

the Subdivision Map Act." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 23.) The purpose of section 66499.37 is "'to ensure that judicial resolution of Subdivision Map Act disputes occurs "as expeditiously as is consistent with the requirements of due process of law."'" (*Hensler v. City of Glendale*, *supra*, at p. 23.)

Old Orchard did not assert a claim under the Subdivision Map Act in the Amended Petition. In its opening trial brief in support of the Amended Petition, Old Orchard briefly argued the City Council "did not have jurisdiction to reconsider a land use approval after it became final" and did not have the power to "unilaterally rescind its approval of the Tract Map and variances." The opening trial brief was filed in March 2015, long after the expiration of the 90-day period for raising a Subdivision Map Act claim based on the September Resolution. The trial court's decision did not identify or address any issues pertaining to approval of the vesting tentative subdivision map.

We decline, however, to treat Old Orchard's challenge to the vesting tentative subdivision map as time-barred or forfeited. The merits of the subdivision map issues have been fully briefed in this court. Considering the history of the Project approval process and the stakes of this litigation, it is important to decide issues on the merits. (See *Anthony v. Snyder* (2004) 116 Cal.App.4th 643, 658 [although Subdivision Map Act claim was time-barred, Court of Appeal reached the merits because the issues were fully briefed, the issues were important, and the trial court had ruled on them].)

B. *The City Council's Approval of the Second Vesting Tentative Subdivision Map Was Proper*.

The March Resolution approved a vesting tentative subdivision map. Old Orchard argues the City Council did not have jurisdiction to approve another vesting tentative subdivision map in September because the approval in the March Resolution was "final and [wa]s subject to judicial review."

"The Subdivision Map Act [citation] . . . is an important tool available to local governments for regulating land use. Obtaining approval of a subdivision map is a

step that a developer must often take when developing a piece of real property. The [Subdivision] Map Act authorizes the legislative bodies of 'local agencies' to regulate and control the design and improvement of subdivisions in their jurisdiction." (Curtin et al., Cal. Subdivision Map Act and the Development Process, *supra*, History, Purpose, and Preemption, § 1.1.) For subdivisions creating five or more parcels, the Subdivision Map Act requires a two-step approval process: approval of a tentative subdivision map followed by approval of a final subdivision map. (Gov. Code, § 66426.)

Approval or denial of a tentative subdivision map is considered a quasi-judicial act subject to judicial review under the abuse of discretion standard. (*Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 644, 651, fn. 2.) In contrast, approval of final subdivision map is a ministerial act because "[a] legislative body shall not deny approval of a final or parcel map if it has previously approved a tentative map for the proposed subdivision and if it finds that the final or parcel map is in substantial compliance with the previously approved tentative map." (Gov. Code, § 66474.1.)

A county lacks discretion under the Subdivision Map Act to deny a final subdivision map if the development substantially conforms to the tentative map and any conditions imposed. (*Youngblood v. Board of Supervisors*, *supra*, 22 Cal.3d at p. 648; see *City of West Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal.3d 1184, 1190-1191.) "The rationale underlying the statutory scheme at issue is that once a 'tentative map is approved, the developer often must expend substantial sums to comply with the conditions attached to that approval,' which 'will result in the construction of improvements consistent with the proposed subdivision, but often inconsistent with alternative uses of the land.' [Citation.]" (*City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 284-285 (dis. opn. of Kennard, J.).)

Based on those principles, Old Orchard asserts that upon approval of the vesting tentative subdivision map in the March Resolution, the City lost jurisdiction to rescind approval or approve another vesting tentative subdivision map in the September

Resolution and could do nothing but approve the final map. Old Orchard confuses jurisdiction and discretion. Approval of a tentative subdivision map deprives the governing body of *discretion*, not *jurisdiction* to deny a final subdivision map. (*Youngblood v. Board of Supervisors*, *supra*, 22 Cal.3d at p. 648.) The Subdivision Map Act does not deprive the governing body of jurisdiction to approve a second or different map if the final subdivision map has not been approved.

If the City Council abused its discretion by approving the vesting tentative subdivision map in the September resolution, the error was harmless. The vesting tentative subdivision map approved in the September Resolution was the exact same map approved in the March Resolution. There were no differences between the maps; therefore, contrary to Old Orchard's argument, there were not two inconsistent tentative subdivision maps in effect at the same time.

Old Orchard argues the City acted unilaterally when it placed the vesting tentative subdivision map on the City Council agenda without a formal request. It was clear that the applicant was the Schools, which did not object to the City Council reconsidering approval of the vesting tentative subdivision map.

Old Orchard argues, "the City violated the well-settled and important rule that landowners and developers must be able to rely on the finality of tentative tract maps before they begin the expensive work of subdividing property." However correct that statement might be as an abstract proposition of law (see *City of Goleta v. Superior Court*, *supra*, 40 Cal.4th at pp. 284-285 (dis. opn. of Kennard, J.)), the concern for a developer's need to rely on the finality of a subdivision map is not implicated here because the two vesting tentative subdivision maps were identical. Approval of the subdivision map in the September Resolution therefore did not upset the Schools' reliance on the subdivision map approved in the March Resolution.

III.

The Frontage Variance Issues

Another component of the March Resolution and the September Resolution was approval of the frontage variance. It allowed lot 12 to have a reduced frontage of 41 feet, which is nine feet shorter than required by the City's municipal code. Old Orchard challenges the frontage variance on the ground substantial evidence did not support the City's findings in support of granting the variance. Old Orchard argues that the vesting tentative subdivision map must be set aside because its approval was conditioned on approval of the frontage variance.

A. *Old Orchard Did Not Waive Its Challenge to the Frontage Variance.*

Respondents contend Old Orchard waived its challenge to the frontage variance by not timely asserting that challenge in the trial court and by not supporting it with citations to the administrative record. We decline to find a waiver. Old Orchard devoted approximately two pages of its opening brief and two pages of its reply brief in the trial court to the issue of the frontage variance. Old Orchard cited the relevant municipal code section, case law, and the City's findings in the administrative record. The facts regarding the basis for the frontage variance are largely undisputed. Old Orchard did not, however, raise in the trial court the issue whether approval of the vesting tentative subdivision map was conditioned on approval of the frontage variance.

B. *Substantial Evidence Supported Approval of the Frontage Variance.*

"Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification." (Gov. Code, § 65906.) "The essential requirement of a variance is a showing that a strict enforcement of the zoning limitation would cause

unnecessary hardship; the burden of showing hardship is on the applicant." (*PMI Mortgage Ins. Co. v. City of Pacific Grove* (1981) 128 Cal.App.3d 724, 731.)

In reviewing an administrative agency's decision, we determine whether substantial evidence supported the agency's findings and whether the findings supported the agency's decision. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.) We give a strong presumption of correctness to the administrative findings. (*Eskeland v. City of Del Mar* (2014) 224 Cal.App.4th 936, 942.)

Under the City's municipal code, a zoning variance may be granted when all of the following have been established: (1) "because of special circumstances applicable to the subject property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance is found to deprive the subject property of privileges not otherwise at variance with the intent and purpose of the provisions of this chapter"; (2) "the granting of a variance or minor exception is necessary for the preservation and enjoyment of one . . . or more substantial property rights"; (3) "the granting of a variance or minor exception will not be materially detrimental to the public welfare or injurious to surrounding property"; and (4) "the granting of a variance or minor exception will not adversely affect the general plan of the city." (City Mun. Code, § 41-638, subd. (a)(2).)

The City's municipal code requires lots in the single-family residence zoning district to have at least 50 feet of street frontage. (City Mun. Code, § 41-237, subd. (b).) In granting the frontage variance, which allowed lot 12 to have 41 feet of street frontage, the City Council made findings in support of each of the requirements of section 41-638, subdivision (a)(2) of the City Municipal Code. Old Orchard argues substantial evidence did not support the findings in support of the first two requirements.

As to the first requirement, the City Council found: "The [P]roject site has a special circumstance related to its size, shape[,] and location. The subject site is a five-acre rectangular shaped parcel that will be constrained by the application of a

County street standard to the [P]roject. In order to provide a larger street area for trash trucks and similar sized vehicles to maneuver, a County's standard for the design of 'knuckles' was imposed on th[e P]roject. The County standard required the taking of more land than proposed, which impacted the applicant's ability to meet the minimum street standard for an R-1 project. Therefore, applying the strict letter of the Code would, in this particular case, deprive the . . . [P]roperty of a use that is otherwise allowed by right in the zone and would deprive the . . . [P]roperty of privileges not otherwise at variance with the intent and purpose of the provisions of this chapter."

According to Respondents, the "subject property" for the frontage variance was lot 12 only, not the entire five-acre Property, and the Orange County standard affected the size and shape of lot 12. Old Orchard argues the subject property for the frontage variance was the entire five-acre Property and nothing about the "size, shape, topography, location or surroundings" (City Mun. Code, § 41-638, subd. (a)(2)(i)) of the Property justified the variance.

Substantial evidence supported a finding that the frontage variance was sought and approved for lot 12 only. The variance application identified two lots—lot 1 and lot 12—as the subject of the requested variances. The application stated, "there is one (1) lot that is challenged within the [P]roject with regard to street frontages." The reason for the variance was given as: "Lot 12 is located on the radius of the knuckle. Its location would require the granting of a lot frontage width variance from 50' to 45'. We believe this variance should be considered as the requirements for the 10' parkway along Santa Clara Avenue and the use of the County standard for knuckle impacted the geometry of the site and restricted our ability to maintain the 50 foot lot frontage on all lots. This lot meets or exceeds all other requirements in the R1 zone."

The request for the Planning Commission action stated: "The applicant is also requesting a variance from Section 41-237(b) of the Santa Ana Municipal Code . . . , which requires lots in the Single-Family Residence (R-1) zoning district to have at least

50 feet of street frontage, as measured from the back of the setback. The applicant's proposal is to have *one new lot in the development (Lot No. 12)* have 41 feet of lot frontage, which is less than the minimum 50 feet of lot frontage. . . . Due to the application of [the Orange County] standard, Lot No. 12 cannot meet the 50-foot street frontage standard. The lot will be in compliance with all other applicable development standards in the R-1 zone, including lot size and setbacks." (Italics added.)

In a letter to the City, dated March 3, 2014, counsel for the Schools stated, "[t]he variance . . . is sought for Lot 12—not for the overall project." In their joint response to Old Orchard's opening brief in the mandate proceedings in the trial court, Respondents argued that "due to the curve and knuckle in the street, 'Lot 12'—the lot receiving the Variance—has an abnormal size and shape."

Orange County's requirement of a knuckle in the bend in the street altered the size and shape of lot 12, thereby creating a special circumstance justifying a variance *for that lot*. The Planning Commission found: "[T]he County's standard for the design of 'knuckles' was *imposed* on th[e P]roject. The County standard required the taking of more land than proposed, which [affected] the applicant's ability to meet the minimum lot width standard for an R-1 project." (Italics added.) We do not construe Government Code section 65906 or the City's municipal code as limiting special circumstances justifying a variance to the preexisting physical condition of the property, or as categorically rejecting any variance justified by circumstances created by government rules and regulations. (See *Allen v. Humboldt County Bd. of Suprs.* (1966) 241 Cal.App.2d 158, 160, 162-163 [county requirement of 40-foot-wide access road in order to subdivide property justified variance].)

As to the second requirement for a variance, the City Council found: "The granting of the variance is necessary for the preservation and enjoyment of substantial property rights. Compliance with the street frontage standard could result in the loss of residential units, which would reduce the feasibility of the proposed use of the [P]roperty,

which impacts the property rights of the owners." Old Orchard argues substantial evidence did not support that finding because "conditions of approval routinely reduce the number of units below the zoning maximum or limit the amount of developable area."

Without the frontage variance, either lot 12 would have to be reconfigured to meet the City's 50-foot frontage requirement or the Schools would not be able to develop lot 12. In the latter case, the Schools would be deprived of a substantial property right. In the former case, the Schools and the City had worked diligently toward coming up with a subdivision map that would accommodate Orange County's knuckle requirement, the Historic Preservation Alternative, and the Schools' desire and right to develop the Property to the extent authorized in a single-family residence zoning district. In 2013, a "lotting study" was conducted to try to eliminate the need for a variance. A solution was not found.

Without the frontage variance, the Schools would lose the right to develop lot 12 to its highest and best use. The knuckle requirement imposed by Orange County was akin to (though not the same as) a regulatory taking in that it would restrict an economically viable use of lot 12. (*Twain Harte Associates, Ltd. v. County of Tuolumne* (1990) 217 Cal.App.3d 71, 80-81.) The record shows Respondents attempted to eliminate the need for a variance but were unsuccessful. The frontage variance therefore was permissible for the preservation and enjoyment of a substantial property right.

We agree with Old Orchard that approval of the frontage variance was a precondition to approval of the tentative subdivision map. The City Municipal Code section 34-67 states: "No map shall be approved for any subdivision which, if subdivided, developed, or used in the manner proposed, would result in a violation of Chapter 8 or Chapter 41 [(zoning)] of this Code; provided, however, a tentative map may be approved subject to conditions that the subdivider obtain permits, variances, or waivers, or modify the proposed subdivision, as necessary to obtain conformity with the requirements of said chapters." We uphold the approval of the frontage variance. The

vesting tentative subdivision map, as approved, therefore did not violate the City Municipal Code section 34-67.

IV.

Disqualification of Councilmember Issue

At the September 2, 2014 meeting of the City Council, councilmember Sarmiento voted to approve the Project. After the vote, Sarmiento announced that he might have an apparent conflict of interest because his son had entered Orange Lutheran High School. Although Sarmiento saw no economic benefit to himself from the vote on the Project, "out of an abundance of caution," he recused himself from voting. He asked that the City Council reconsider its vote on the Project.

The City Council then voted unanimously to reconsider the Project. Sarmiento participated in the vote. The City Council next voted unanimously to continue the matter for two weeks. Sarmiento participated in that vote too. At the City Council meeting on September 16, 2014, Sarmiento abstained from voting on the Project.

Old Orchard argues that once Sarmiento announced the apparent conflict of interest, he was disqualified from voting on the motion to reconsider the Project and the motion to continue the vote for two weeks.[13] According to Old Orchard, Sarmiento could not "recuse himself, ignore the disqualification for the next few votes, and later abstain due to the same conflict."

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[13] Section 2-105 of the City Municipal Code, governing disqualification of council members, states: "No member of the council shall abstain from any vote unless disqualified, and no disqualified member shall vote. Any disqualified member shall openly state to the presiding officer the fact and nature of such disqualification and shall not be subject to further inquiry. Where no clearly disqualifying conflict of interest appears, the matter of disqualification may, at the request of the member affected, be decided by the other members of the council. A member disqualified by conflict of interest shall request and be granted permission by the presiding officer to absent himself from the room where the council is meeting during debate and vote on the matter. Any member having a remote interest in any matter shall divulge the same to the council before voting."

A party challenging the fairness of an administrative hearing on the ground of bias has the burden of establishing "'"an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims."'" (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483.) The party seeking to show actual bias must prove bias "'with concrete facts.'" (*Ibid.*)

Old Orchard argues it met this burden by Sarmiento's admission that he might have an apparent conflict because his son had entered Orange Lutheran High School. But in a letter dated March 16, 2015, the Fair Political Practices Commission concluded that Sarmiento had no financial interest in the City's decision on the Project because he had no financial interest in Orange Lutheran High School based on his son's attendance there. Further, a decision maker's self-imposed disqualification made out of an abundance of caution based on a concern over a possible apparent conflict of interest is not concrete evidence of actual bias.

If Sarmiento did have an actual conflict of interest, he acted properly by voting to reconsider the Project and to continue the matter for two weeks. The remedy for Sarmiento's participation in the vote on September 2 to approve the Project would be to vacate the City Council's decision and set the matter for a new hearing. (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1177.) That is precisely what the City Council did. Sarmiento voted in favor of doing the right thing.

V.

Administrative Record Issue

Before trial, Old Orchard moved to compel the City to produce e-mail communications between attorneys for the City and attorneys for the Schools for inclusion in the administrative record. The e-mails are dated from March 4, 2014 to September 19, 2014 and are identified on a privilege log prepared by the City. The e-mails are typically described as "Email re: Sexlinger Property" or "Email re: Sexlinger Project" in the "Document Type/Description" column of the privilege log. The trial court

granted Old Orchard's motion as to the eight e-mails between staff members and denied the motion as to the rest of the e-mails.

Old Orchard challenges the trial court's denial of its motion to compel. Respondents assert Old Orchard's challenge to the trial court's discovery ruling is outside the scope of this appeal because the notice of appeal is from the judgment only. An appeal from a judgment is deemed to include any nonappealable ruling "which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party." (Code Civ. Proc., § 906.) A notice of appeal need not specify most prejudgment nonappealable orders. (See Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2016) ¶ 3:119, p. 3-53.) Old Orchard's notice of appeal from the judgment therefore encompasses the prejudgment discovery order.

Old Orchard argues these e-mail communications were made before approval of the Project in the September Resolution and therefore were not protected by the common interest doctrine.[14] The administrative record must include, among other things, "[a]ll written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with this division or with respect to the project." (Pub. Resources Code, § 21167.6, subd. (e)(7).) We will assume the e-mail communications identified by Old Orchard should have been made part of the

[14] Public Resources Code section 21167.6 does not abrogate the attorney-client privilege or the attorney work product doctrine. (*Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 913.) Although disclosure of a communication between parties can constitute a waiver of the attorney-client privilege and attorney work product doctrine, communications between counsel for the public agency and counsel for the applicant might be protected under the common interest doctrine. (*Id.* at p. 914.) "The common-interest doctrine allows disclosure between parties, without waiver of privileges, of communications protected by the attorney-client privilege or the attorney work-product doctrine where the disclosure is necessary to accomplish the purpose for which the legal advice was sought. [Citation.]" (*Ibid.*)

administrative record. We conclude Old Orchard has not shown prejudice from the exclusion of the e-mails.

Under the California Constitution, a judgment may not be set aside for procedural error or error in the admission or rejection of evidence unless the error "has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) A party arguing that evidence was improperly rejected bears the burden of demonstrating prejudice from the error. (*Easterby v. Clark* (2009) 171 Cal.App.4th 772, 783; *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1038.) This constitutional requirement of prejudice applies to disputes over the scope of a CEQA administrative record. (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 308.)

Old Orchard does not argue it suffered prejudice from the exclusion of the e-mail communications from the administrative record. In its reply brief, Old Orchard asserts that "the September re-approval was clearly planned and executed as part of Respondents' litigation strategy to defend the City's March decision, not as a stand-alone reconsideration." Old Orchard makes that assertion not to show prejudice, but in arguing the e-mails were made after approval of the Project and therefore not protected by the common interest doctrine.

VI.

Costs Issue

Old Orchard challenges the award to the City of $4,075 in costs. By doing so, Old Orchard is, in effect, appealing a postjudgment order granting in part its motion to tax costs. We have no jurisdiction to consider Old Orchard's challenge to the postjudgment order because Old Orchard did not file a notice of appeal from it.

Judgment was entered on November 4, 2015. The judgment awarded Respondents their costs of suit, "[u]pon appropriate proof and subject to resolution on any motion to strike or tax costs." The Schools and the City each filed a cost memorandum on November 18. Old Orchard filed motions to tax costs on December 8

and 9, 2015. Old Orchard filed its notice of appeal on December 29, 2015. The notice of appeal states it is from "Judgment Denying Petition for Writ of Mandate (Cal. Code Civ. Proc. § 904.1(a)(1)." A minute order on Old Orchard's motions to tax costs was entered on February 5, 2016. The order granted in part Old Orchard's motion to tax the City's costs and granted Old Orchard's motion to tax the Schools' costs (by this point, the Schools were appearing as Civic Property Group, Inc.). The order reduced the City's costs from $12,300 to $4,075. Old Orchard did not file a notice of appeal from the order on its motions to tax costs.

"A postjudgment order awarding or denying costs is a separately appealable order." (*Kajima Engineering and Construction, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402.) We have no jurisdiction to consider a challenge to a postjudgment order on a motion to tax costs unless the notice of appeal is filed from that order. (*Ibid.*)

Old Orchard filed a notice of appeal from the judgment only. "[Old Orchard] did not file a notice of appeal from the order granting the motion to tax costs. Consequently, we are without jurisdiction to review it." (*Kajima Engineering and Construction, Inc. v. Pacific Bell, supra,* 103 Cal.App.4th at p. 1402, citing Code of Civil Procedure section 906.)

Old Orchard argues the cost award was subsumed in the judgment and therefore encompassed by the notice of appeal. Old Orchard is not challenging the determination in the judgment that Respondents are entitled to recover costs. Rather, Old Orchard is arguing the trial court erred by denying in part its motion to tax the City's claimed costs for record preparation based on evidence of a stipulation. That determination was made, not in the judgment, but in a postjudgment order. To preserve its challenge to the trial court's ruling, Old Orchard had to file a separate notice of appeal from the postjudgment order.

DISPOSITION

The judgment is affirmed. In the interest of justice, each party will bear its own costs on appeal.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.